



AN HONORS UNIVERSITY IN MARYLAND

October 11, 2005

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DAR)
IMD 3C132, 3062 Defense Pentagon
Washington, DC 20301-3062

Office of the Vice President for Research
and Dean of the Graduate School
University of Maryland, Baltimore County
1000 Hilltop Circle
Baltimore, Maryland 21250

PHONE: 410-455-2199
FAX: 410-455-1092
VOICE/TTY: 410-455-3233
www.umbc.edu

Re: DFARS Case 2004-D010; Defense Federal Acquisition Regulation Supplement;
Export-Controlled Information and Technology

Dear Ms. Williams:

The Department of Defense (DOD) is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for preventing unauthorized disclosure of export-controlled information and technology under DoD contracts. Specifically, the proposed rule contains a new DFARS Subpart 204.73, *Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities*, and an associated contract clause tentatively entitled 252.204-70XX, *Requirements Regarding Access to Export-Controlled Information and Technology*.

The aforementioned Subpart and its associated contract clause contain language which is misleading, and in effect will have a severe and detrimental impact on research universities such as the University of Maryland, Baltimore County (UMBC). The Subpart and its associated contract clause will be unduly burdensome and impossibly problematic in practice. Moreover, the entire Subpart is misleading in its complete omission of any mention of the statutorily recognized fundamental research exemption/exception, as recognized in both the Export Administration Regulations (EAR) and the International Trafficking in Arms Regulations (ITAR). In particular, Section 204.7302 *General* purports to describe export control laws, but mentions nothing concerning the exemptions afforded universities for basic research.

Section 204.7304 *Contract clause* specifically calls for use of the clause at 252.204-70XX, *Requirements Regarding Access to Export-Controlled Information and Technology*, in solicitations and contracts for research and development (see Section 204.7304(a)). The initial subsections contain no mention of even the existence of a fundamental research exemption. Many contracting officers or administrators may not then know of such a vitally important but omitted provision of the export control laws. Ominously, the remainder of the Section 204.7304 goes into great detail about "required" action and programs the contractor must have, as copied in pertinent part below (*emphasis added*):

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d) The **Contractor shall maintain an effective export compliance program. The program must include adequate controls over physical, visual, and electronic access** to export-controlled information and technology to ensure that access by foreign firms and individuals is restricted as required by applicable Federal laws, Executive orders, and regulations.

(1) The access control plan shall **include unique badging requirements** for foreign nationals and foreign persons **and segregated work areas** for export-controlled information and technology.

(2) **The Contractor shall not allow access** by foreign nationals or foreign persons to export-controlled information and technology **without obtaining an export license**, other authorization, or exemption.

(e) The Contractor shall--

(1) **Conduct initial and periodic training** on export compliance controls for those employees who have access to export-controlled information and technology; and

(2) **Perform periodic assessments** to ensure full compliance with Federal export laws and regulations.

Under the DFARS provisions our many fundamental research projects will require determinations of the need for export licenses or registration in order for our foreign students, faculty, technicians, and other research staff to work on these projects. Complex security procedures will have to be developed and implemented to ensure that non-licensed foreign faculty and students will not have access to information and equipment perceived by DOD contracting personnel as requiring limited access. Moreover, substantial and unaffordable investments in staff and resources will be required to monitor the research operations, personnel and equipment available on campus as well as subcontractors. Many items routinely used in university research, for example GPS equipment and bio-processing fermenters, are likely to be considered included in controlled lists.

Importantly, in no section of the proposed DFARS Subpart nor in the proposed contract clause, is there any mention of National Security Decision (NSD) *Directive 189*, entitled *National Policy On The Transfer Of Scientific, Technical And Engineering Information*. This directive establishes the national policy for controlling the flow of science, technology and engineering information produced in federally funded fundamental research at colleges, universities, and laboratories. NSD Directive 189 defines "Fundamental research" to mean "basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons."

Although first published in 1985, President George W. Bush has reaffirmed the federal government's commitment to this policy as published. In Section III, *POLICY*, the Directive states in pertinent part:

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It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification. *(portion omitted)*. **No restriction may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes *(emphasis added)*.**

While 252.204-70XX(f) ostensibly purports not to "change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations", the overall effects of the contract clause and Subpart 204.73 in total are quite different. They all but eliminate the fundamental research exemption. At the very least, the provisions suppress the importance of the fundamental research exemption and give the impression that all disclosures are unauthorized and violative of export control regulations. These provisions would grind much university research to an effective halt, as well as compelling discriminatory treatment of foreign nationals on campus. The enforcement burden on universities would be enormous and would stifle research creativity at the very point in history when America needs its research foundation more than ever.

The result of the adoption and implementation of the proposed DFARS provisions would cripple the teaching and research at many universities like UMBC who would be faced with the impossible burden of implementing expensive and administratively complex security procedures regulating access of foreign nationals to classrooms and laboratories. More generally, but also more importantly, the proposed DFARS provisions would severely limit the diversity and richness of U.S. higher education and threaten our nation's leadership position in the conduct of world class research and teaching.

Sincerely,



Scott A. Bass, Ph.D.
Vice President for Research and
Dean of the Graduate School

cc: Dr. Freeman A. Hrabowski, III
Dr. Arthur Johnson
David Gleason, Esq.